No. 11,619

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOSEPH PITTA, *Appellant,*
VS.
UNITED STATES OF AMERICA, *Appellee.*

APPELLANT'S OPENING BRIEF.

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JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of conviction in the United States District Court for the Northern District of California, Southern Division.

The offenses charged in the Indictment are violations of the Narcotic Laws of the United States, the Jones-Miller Act, 21 U.S.C.A. Section 174, the Harrison Narcotic Act, 26 U.S.C.A. Sections 2553 and 2557, and conspiracy, 18 U.S.C.A. Section 88, to violate the Jones-Miller Act, 21 U.S.C.A. Section 174. The District Court had jurisdiction under 28 U.S.C.A. Section 41, subd. 2.

This Court has jurisdiction to review the judgment of the District Court under the provisions of 28 U.S.C.A. Section 225(a) and (d).

The pleadings necessary to show the evidence of jurisdiction are

(a) The Indictment (R. 2-33);

(b) Judgment and Commitment (R. 37-38);

(c) Notice of Appeal (R. 39-40);

(d) Statement of Points on Appeal (R. 163-165).

STATEMENT OF THE CASE.

Joseph Pitta, the Appellant, was indicted by the Grand Jury for the Northern District of California, Southern Division, on September 18, 1946.

The Indictment charged Appellant and others in Fifty-six counts with violations of the Narcotic Laws of the United States, viz., the Jones-Miller Act, the Harrison Narcotic Act and Conspiracy to violate the Jones-Miller Act. The Indictment contained Fifty-six Counts. Of these Fifty-five were substantive counts, only one of which, the twenty-third, charged Appellant, Joseph Pitta. The conspiracy count, the Fifty-sixth or last count in the Indictment, is the usual all embracing conspiracy charge in which all defendants named in the substantive counts are charged with conspiracy to violate the statutes which are the basis of the substantive counts.

It is to be noted that the Appellant is named in only one substantive count, the twenty-third, and is mentioned in only one of the twenty-four overt acts charged in the conspiracy count, namely, the thirteenth.

The Indictment in general, both the substantive and conspiracy counts, evolve around alleged violations of the Federal Narcotic Acts committed in the City and County of San Francisco, in the jurisdiction of the District Court.

In general, the Indictment covers a series of alleged transactions built around a bar room known as the Star Dust Bar, located at 1098 Sutter Street in San Francisco. The indictment charges these transactions or violations to have occurred during a period of time between January 5th, 1946 and March 1st, 1946.

The substantive count with which the Appellant was charged and upon which he was convicted, viz. the twenty-third count, alleged:

> "That Vincent Bruno and Joseph Pitta on or about the 10th day of January, 1946 in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew."

On December 2d, 1946, the Appellant entered his plea of not guilty (R. 33-34).

On April 22d, 1946, the case of Appellant proceeded to trial, at which time on motion of the United States Attorney the Appellant went to trial on all counts in the Indictment, save and except the conspiracy count. The Court at this time granted a severance of some sort, and ordered Appellant to trial (R. 34-35).

The Appellant's case was tried to a jury on April 22d, 1946 (R. 35-36).

The jury returned a verdict finding Appellant guilty on the twenty-third count of the Indictment on April 23d, 1946 (R. 36).

The Appellant upon the verdict of guilty on the twenty-third count of the Indictment was sentenced to a term of two years of imprisonment and a fine of One Dollar ($1.00). Judgment was imposed on April 23d, 1946 (R. 37, 38).

Appellant moved the Court for an instructed verdict of not guilty at the conclusion of the Government's case, which motion was denied (R. 112-117).

At the conclusion of the Government's case, on motion of the United States Attorney, all counts of the Indictment except the twenty-third count were dismissed (R. 116-117).

A SUMMARY OF THE EVIDENCE.

The Federal Narcotic Agents testified that during the month of January and February 1946, they had under observation a bar room in the City and County of San Francisco known as the Star Dust Bar.

That on the 10th day of January, 1946, they had secreted themselves in a room in the rear of the Star Dust Bar, from which position they had at all times a liquor storeroom of the Star Dust Bar under observation.

At about Seven-thirty on the evening of January 10th, one of the agents entered the liquor storeroom and removed from between some beer cases a paper. The agents took from this paper a small quantity of a powder and then one of the agents refolded the paper and returned it to its place of concealment. The powder which they took from the paper was identified by a Government chemist as heroin hydrochloride.

Later that evening at about 10:45 p. m. the agents observed Vince Bruno, a defendant named in the Indictment with Appellant enter the liquor storeroom from the rear of the Star Dust Bar with Appellant. Bruno locked the door behind him. Bruno removed the paper the agents had previously examined from between the beer cases, opened the paper and using a penknife took some of the contents of the paper and with the penknife snuffed the contents into his nostrils. Bruno then passed the paper to Appellant with the knife. Appellant then took some of the substance on the knife and inhaled it into his nostrils. Appellant

refolded the paper and returned it with the penknife to Bruno who replaced it between the beer cases.

The above constituted the case of the Government.

The Appellant called certain witnesses to testify concerning the physical makeup of the room in question with the end in view of showing that the Government agents could not have seen what they testified to. No point is being made to this effect on this appeal.

The Appellant was called as a witness on his own behalf. He testified that over a period of a couple of years he had gone to the Star Dust Bar to exchange liquor on about two to four times. That he was never there as late as 10:30 at night and that he did not know whether he was there on January 10th. He said he was in the bar and restaurant business in Oakland and also took care of his father's ranching properties. He said he had been convicted of felony in 1940 in San Diego. He denied being in the liquor room of the Star Dust Bar on January 10, 1946 with Vince Bruno and using a bindle of heroin. He denied he possessed a bindle of heroin at that time.

SUMMARY STATEMENT OF POINTS ON APPEAL.

The Appellant, in support of his contention that the judgment of conviction against him should be reversed, contends and will argue:

1. The Trial Court should have granted his motion for an instructed verdict of not guilty because of the insufficiency of the evidence;

2. The Trial Court erred in instructing the jury.

ARGUMENT.

I. THE TRIAL COURT SHOULD HAVE GRANTED APPELLANT'S MOTION FOR AN INSTRUCTED VERDICT OF NOT GUILTY BECAUSE OF THE INSUFFICIENCY OF THE EVIDENCE.

The Appellant in the twenty-third count of the indictment was charged with "fraudulently knowingly concealing and facilitating the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin in quantity particularly described as one bindle containing approximately one dram of heroin * * * which had been imported into the United States of America contrary to law" in violation of the Jones-Miller Act, 21 U.S.C.A. 174.

This is the only count upon which Appellant was convicted. It is the Appellant's contention that as a matter of law the evidence was insufficient to sustain his conviction and therefore a directed verdict should have been granted.

The question to be determined by this Court, we believe, can best be stated as follows:

> Does the taking of an injection or inhalation of an illicit narcotic drug by a person constitute a violation of the Jones-Miller Act?

It is the position of Appellant that the evidence taken in the most favorable light for the Government, as it must here, shows Appellant did nothing more than take into his nostrils a portion of heroin given him by his co-defendant Bruno. This, we maintain, was not a violation of Title 21 U.S.C.A. Section 174.

The particular Count upon which Appellant was convicted charged him with the concealing and facilitating the concealment of a bindle of heroin.

To conceal has been defined as "To hide or withdraw from observation, to prevent the discovery of; to withhold knowledge of."

United States v. Bookbinder, 281 Fed. 207-210.

This circuit in *Pon Wing Quong v. United States,* 111 Fed. (2d) 751, 756, in construing the same Jones-Miller Act determined the word "facilitate" as used in this statute to have the common and ordinary dictionary meaning. This court said:

> "Since the term 'facilitate' seems not to have any special legal meaning, the framers of this statute must have had in mind the common and ordinary definition as expressed by a standard dictionary. Quoting from Webster's Unabridged Dictionary, 'facilitate' is defined as follows: 'To make easy or less difficult; to free from difficulty or impediment; as to facilitate the execution of a task.'"

Having in mind the definitions given for the words "conceal" and "facilitate," did this Appellant either conceal or facilitate the concealment of the heroin mentioned in the twenty-third count of the indictment?

The particular heroin, according to all of the evidence, had been secreted prior to the Appellant ever being in the liquor room of the Star Dust Bar. It had been secreted and it had been discovered. The narcotic officers discovered it prior to ever seeing the

Appellant in the liquor store room. The Appellant did not conceal it, nor did he do anything to facilitate its concealment. The only act of the Appellant in connection with the whole transaction was the taking of a portion of the heroin from defendant Bruno and inhaling some of it.

We submit the evidence is not susceptible to the construction that Appellant either concealed or facilitated the concealment of the heroin mentioned in the count upon which he was convicted.

But the particular section of the Jones-Miller Act with which we are concerned, Section 174 of Title 21 U.S.C.A., contains the following provision:

> "* * * Whenever on trial for a violation of this section the defendant is shown to have or have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the Jury."

This presumption contained in the statute has been held constitutional.

Yee Hem v. U. S., 268 U.S. 178;
Rosenberg v. U. S., 13 Fed. (2d) 369.

The trial court in the instant case instructed the jury in accord with this presumption.

Now the question arises, does the evidence in this case sustain the view that this Appellant was in possession of the heroin alleged to have been concealed by him in the twenty-third count of the indictment.

It is Appellant's position that he did not have such possession and therefore the presumption contained in the statute was not applicable to him.

Possession is defined in Webster's International Dictionary as follows: "The having, holding or detention of property in one's power or command; actual seizin or occupancy; ownership, whether rightful or wrongful."

Did the Appellant by the act of taking an inhalation of a narcotic drug have such possesion as such word is commonly understood or as contemplated by the statute in question?

We have been unable to find any case exactly in point under the Jones-Miller Act. This is the first time, as far as we know, that the precise question has been before an Appellate Court.

Did the Appellant have such dominion and control of the heroin charged in the indictment as gave him the power of disposal? The evidence does not sustain this view. Yet in *United States v. Hororowicz,* 105 Fed. (2d) 218, in construing possession of liquor under the internal revenue laws the court said:

> "Possession is the exercise of such a power over a thing as attaches to lawful ownership or as was said in Toney v. United States, 62 App. D. C. 307, 67 F. (2d) 573, 574, the possessor 'must have had such dominion and control of the liquor as would give him the power of disposal.' "

In *Colbough v. United States,* 15 F. (2d) 929, 931, the circuit court for the eighth circuit discusses pos-

session of liquor by one merely taking a drink from a bottle and we think this case should control the disposition of this appeal. The court said:

> "The evidence does not even show that defendant had, or had ever had, such possession of the bottle of whisky as is connoted by merely taking a drink therefrom upon invitation of the owner of the whisky; on the contrary, the evidence is uncontradicted that defendant was arrested before he took the drink, for which he says he had gone to the place of arrest. Even if he had, the weight of the authorities is that such fact does not constitute criminal possession. Brazeale v. State, 133 Miss. 171, 97 So. 525; State v. Munson, 111 Kan. 318, 206 P. 749; Sizemore v. Com., 202 Ky. 273, 259 S. W. 337; Harness v. State, 130 Miss. 673, 95 So. 64; Anderson v. State, 132 Miss. 147, 96 So. 163; People v. Ninehouse, 227 Mich. 480, 198 N. W. 973; State v. Jones, 114 Wash. 144, 194 P. 585.
>
> "Possession of liquor, as of other instruments and fruits of crime, involves knowledge, dominion, and control, with plenary power of disposal in the alleged possessor. Grantello v. U. S. (C.C.A.) 3 F. (2d) 117; Patrilo v. United States (C.C.A.) 7 F. (2d) 804. Absent the power of disposal, either sole or joint, with Cope, the mere fact that defendant knew Cope had the whisky would not make defendant guilty, since criminal possession requires more than knowledge of possession in another. Patrilo v. United States, supra; People v. Archer, 220 Mich. 552, 190 N. W. 622; People v. Germaine, 234 Mich. 623, 208 N. W. 705."

In *State v. Lane* (Mo.), 297 S. W. 708, the court held the mere holding another's bottle of whiskey momentarily while taking a drink not possession sufficient to justify conviction under revenue laws of that state relative to the possession of intoxicating liquor.

We submit that the Appellant did not conceal or facilitate the concealment of the narcotic drug charged against him. That he did not have such possession as intended by the statute in question or as possession has been defined by the courts.

The mere taking of an inhalation of an illicit drug in possession of another is not a violation of the Jones-Miller Act.

The evidence is insufficient as a matter of law to sustain Appellant's conviction and the trial court should have instructed a verdict of not guilty.

II. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY.

The Trial Court instructed the jury as follows:

> "That means that the only question before the jury in this case is this: the only question before the jury is a question which arises out of this conflict; the narcotic agents of the United States have testified that they saw the defendant in the possession of the narcotic here in question. The defendant has denied that. *If you are satisfied beyond a reasonable doubt that the narcotic agents have told the truth, you may bring in a verdict of guilty. If, on the contrary, you are not satisfied beyond a reasonable doubt that they have told the*

> *truth, you may bring in a verdict of not guilty.*" (R. 160).

This instruction, we submit, was erroneous in that it limited the jury to a consideration of the testimony of the narcotic agents and eliminated from their consideration the testimony of the Appellant and the witnesses who testified in his behalf.

The instruction, in effect, told the jury they were to base their verdict on whether they had or had not a reasonable doubt as to the veracity of the narcotic agents. This, we submit, is not the law.

The jury has the right to consider all of the evidence offered in the case and if after such consideration they are convinced of a defendant's guilt beyond a reasonable doubt they should convict; if not, they should acquit.

In *United States v. Pape,* 144 Fed. (2d) 778, 791, the Circuit Court for the Second Circuit said:

> "The Judge has an overall duty to decide whether the case is strong enough under the applicable rules of law to go to the jury at all, and then he must admonish the jury of its duty to free the accused *if upon all the evidence it is not convinced of guilty beyond reasonable doubt.*"

In the instant case, the Court in effect told the jury if they believed the narcotic agents had told the truth they should convict. The Appellant denied he was present at the time the agents said he was in the Star Dust Bar liquor room. This denial the Court eliminated from the jury's consideration. The agents

could have been telling the truth and yet have been honestly mistaken as to the identity of Appellant. The jury were limited to a consideration of the Government's testimony.

This instruction was erroneous. True, the error was not called to the Court's attention at the conclusion of the instructions. But this Court has the power to notice such error despite this fact in a proper case. This, we submit, is such a case. Here, the Appellant was subject to the presumption arising from the Jones-Miller Act and then the Court in effect eliminates by the complained of instruction, any explanation by Appellant to offset this presumption.

CONCLUSION.

We respectfully submit that because of

(1) The failure of the trial court to instruct a verdict of not guilty, and

(2) The erroneous instruction given the jury the judgment of the Trial Court should be reversed.

Dated, San Francisco,
August 28, 1947.

Respectfully submitted,
JAMES B. O'CONNOR,
Attorney for Appellant.